

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE
MISDEMEANOR DIVISION

FILED BY R. McVaskey
BY MARTIN D. BUNNELL
CLERK Pursuant to
18-1401
2008 SEP 15 AM 8:48

IN RE:

PETITION OF
KNOX COUNTY PUBLIC DEFENDER

GENERAL SESSIONS
CRIMINAL DIV.
KNOXVILLE, TN
Docket No. (unassigned)

**SUPPLEMENTAL BRIEF IN SUPPORT OF SWORN PETITION TO SUSPEND
APPOINTMENT OF THE DISTRICT PUBLIC DEFENDER TO DEFENDANTS IN THE
KNOX COUNTY GENERAL SESSIONS COURT, MISDEMEANOR DIVISION**

The Knox County Public Defender (the "Public Defender") files this Supplemental Brief to bring to the Court's attention facts which have developed since the Court heard proof on the Sworn Petition on June 10, 2008, and to provide additional legal authority for the relief sought by the Public Defender.

This Court is aware that the Public Defender later filed petitions similar to the Sworn Petition filed in this Court in each of the three divisions of Knox County Criminal Court. The resignation of a Public Defender lawyer assigned to Division II and the maternity leave of another Public Defender lawyer assigned to Division III have precipitated these actions. The Public Defender's office now has only 20 attorneys, including the elected Public Defender, down from the 22 that the office had at the time the Sworn Petition was filed in March. The Public Defender recently hired another lawyer, who is currently undergoing training. In Division I, the Public Defender has requested that the Court temporarily suspend appointments of the Knox County Public Defender to represent defendants in that court. In Divisions II and III, the Public Defender has requested not only that the court suspend appointments of the Public Defender, but also that the Public Defender be allowed to withdraw from certain cases to which the office has already been appointed.

The Public Defender supported his petitions in the Criminal Court divisions with affidavits from the lawyers assigned to those divisions, which in pertinent part state, "If I continue to receive new appointments, I cannot afford competent representation to my existing clients and to the new appointments. I believe that I have reached my professional capacity in terms of caseloads."

Article I, Section 9 of the Tennessee Constitution provides "[t]hat in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel." This provision is similar to the guarantee provided by the Sixth Amendment to the United States Constitution, which states that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." In addition, Tennessee statutes provide that "[e]very person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for the person's defense, as well to facts as to law." T.C.A. § 40-12-102.

The Tennessee Supreme Court has interpreted Article I, Section 9 and T.C.A. § 40-12-102 and its predecessors as guaranteeing more than merely presence of a "warm body." The court has recognized that counsel appointed to represent a criminal defendant must have an adequate opportunity to prepare the defendant's case, which must include investigation of the potential sources of relevant facts as well as the applicable law. *Johnson v. State*, 372 S.W.2d 192, 193-94 (Tenn. 1963); *Poindexter v. State*, 191 S.W.2d 445, 445-46 (Tenn. 1946); *State v. Poe*, 76 Tenn. 647, 652-57 (Tenn. 1881). As the court said in *Poindexter*,

Whether or not an offender is punished in a given case is of importance to both society and the culprit, but it is of transcendent importance that basic principles of justice and the constitutional right to a fair trial shall be observed, including the timely right to representation by counsel, without unreasonable interference or limitation.

Poindexter, 191 S.W.2d at 446.

The United States Supreme Court has similarly interpreted the guarantees of the Sixth Amendment that the Court discussed in *Strickland v. Washington*. See *Kimmelman v. Morrison*, 477 U.S. 365, 383–87 (1986). In discussing the "performance" prong of the *Strickland* standard, the Court stated that

" . . . counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecutor's case and into various defense strategies, we noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Id. at 384 (quoting *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984)).

The ability to provide the assistance of counsel that the United States and Tennessee Constitutions require depends to a critical extent on time—does the lawyer have enough time to adequately prepare the client's case?

It is clear that the Public Defender lawyers have the skills necessary to represent criminal defendants effectively. What is equally clear is that these lawyers lack the time to prepare their clients' cases so that each appointed client is provided effective assistance of counsel. As the evidence at the June 10, 2008, hearing demonstrated, in the vast majority of cases the only investigation that the lawyer is able to perform is a single, thirty-minute interview of the client. While the state and federal constitutions do not entitle these clients to the best defense, they do require that these clients receive effective assistance of counsel. The lawyer cannot provide effective assistance of counsel if he or she is generally only able to interview the client for a single, half-hour period in preparing the case. This is an unreasonable limitation imposed on the lawyer because of an excessive caseload. The lawyer simply does not have enough time to perform a reasonable investigation and may not have enough information to determine whether

proceeding down a particular investigatory path is unnecessary. Therefore, the "adversarial testing process" breaks down.

In contrast, the AOC has reduced the "transcendent importance" of observing basic principles of justice in providing indigent defense to a mere numbers game. The Public Defender notes with some irony that if the State were actually concerned about protecting taxpayer funds, it could provide the Public Defender with ten additional lawyers for about forty percent of the cost that the AOC has alleged the relief sought in the Sworn Petition would cost. *See* September 12, 2008 Affidavit of Mark Stephens and attachment, collectively attached hereto as **Exhibit A**.

Under the most expensive scenario envisioned by Mr. Stephens' affidavit—hiring lawyers with three years' experience—it would cost the State approximately \$1,420,000 to provide funding for the Public Defender to hire ten additional lawyers. Contrast this with the approximately \$2,500,000 that the AOC estimates the Public Defender's requested relief would cost. *See* Motion for Intervention of Attorney General and/or Joinder of Administrative Office of the Courts (file date June 6, 2008), at p. 1, and accompanying Affidavit of Elizabeth A. Sykes. Although this is certainly a point worth considering, as the Public Defender has argued throughout these proceedings, the cost of the relief is simply not relevant to determining under Supreme Court Rule 13 whether the Public Defender is entitled to relief.

As the proof at the June 10, 2008, hearing demonstrated, the situation at the Public Defender's office is dire. The situation has become even worse over the past three months. The

Public Defender therefore renews its plea for the relief sought in the Sworn Petition or such other relief as the Court deems appropriate.

Respectfully submitted,

CHAMBLISS, BAHNER & STOPHEL, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing pleading upon the following individual(s) via hand-delivery or United States Mail, postage prepaid, and correctly addressed as follows:

Douglas Earl Dimond
State of Tennessee
Office of the Attorney General
P.O. Box 20207
Nashville, Tennessee 37202

This 12th day of September, 2008.

T. Maxfield Bahner (by permission)
T. Maxfield Bahner
Hugh J. Moore, Jr.
D. Aaron Love
mark stephens

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE
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IN RE:

PETITION OF
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Docket No. (unassigned)

AFFIDAVIT OF MARK STEPHENS

Mark Stephens, having first been duly sworn, states:

1. My name is Mark Stephens. I am the District Public Defender for the Sixth Judicial District (Knox County) for the State of Tennessee, having been elected to that position on September 1, 1990, and subsequently on September 1, 1998, and September 1, 2006.

2. On March 26, 2008, I filed in this Court a Sworn Petition to suspend appointment of the District Public Defender to represent defendants in the Knox County General Sessions Court, Misdemeanor Division.

3. On June 6, the Attorney General, on behalf of the Administrative Office of the Courts ("AOC"), filed a Motion to Intervene in the proceeding commenced by the filing of the Sworn Petition.

4. I have read and am familiar with the AOC's Motion to Intervene and the supporting Affidavit of Elizabeth A Sykes, Director of the AOC. In this Affidavit, Ms. Sykes estimates that, if the Public Defender is granted the relief requested in the Sworn Petition, it will cost the State more than \$2,600,000.00 per year for fees and expenses of private attorneys to be appointed to represent indigent defendants as required by Supreme Court Rule R13.

5. Attached hereto as **Exhibit 1** is the Public Defender's analysis of the cost of adding ten (10) lawyers and requisite support staff to the Public Defender's office ("Cost

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Analysis"). As the Cost Analysis indicates, the cost to the State of adding ten (10) attorneys to the Public Defender's staff, with requisite support staff, would be in the range of \$940,000.00 to \$1,040,000.00. Thus, adding ten (10) lawyers to the Public Defender's staff would cost less than 40% of the total cost to grant the relief requested by the Public Defender compared to the cost of appointing members of the private bar to represent indigent defendants.

6. The salaries for attorneys and investigators set out in the Cost Analysis are by statute. *See* T.C.A. §§ 8-7-105, -201, -226, -236; 8-14-207. The salaries for secretaries are set by the District Public Defender's Conference. The Cost Analysis sets out the salaries and other expenses entry-level attorneys through attorneys with three years of experience, as well as the salaries and other expenses for entry-level investigators and secretaries. The Public Defender's Office attempts to hire personnel who are entry-level or who have limited experience in order to use state and county funds in the most cost-efficient manner. The formulas used to determine the ratio of the number of attorneys to secretaries and to investigators are set by the State.

7. Unless the State provides the Public Defender's office with additional lawyers, the lawyers in the Public Defender's office cannot comply with ethical requirements to provide effective representation to the indigent defendants they are assigned to represent. The Sixth

Amendment to the United States Constitution and Article 1, Section 9 of the Tennessee

Constitution guaranty a criminally accused defendant the right to be represented by counsel.

Both Tennessee statutes and court rules implement the right to counsel for indigent defendants in Tennessee. These rights do not depend upon the ability of the State of Tennessee to pay the costs for defense. The Public Defender's office has an ethical and constitutional duty to pursue relief from its current caseloads, including the relief sought in the Sworn Petition.

8. When the Public Defender's office is overloaded so that the lawyers cannot provide effective representation as required by Tennessee Supreme Court Rule 8 and the requirements of the Federal and State Constitutions, the Public Defender's office has a duty to pursue relief from its current caseloads, including the relief sought in the Sworn Petition.

FURTHER AFFIANT SAITH NOT.

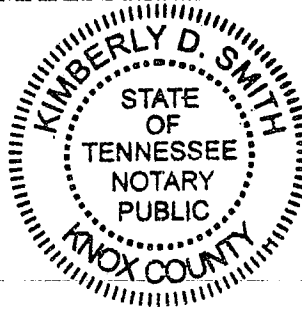
This 12th day of September, 2008.


MARK STEPHENS

Sworn to and subscribed before me
this 12th day of September, 2008.


Notary Public

My Commission Expires: 4-10-12



Cost Analysis for Ten Additional State Attorneys & Support Staff

Position	COST PER EMPLOYEE						
	Salary Expense	FICA/Retirement @ 20.67%	Family Health Insurance	Salary & Benefits	Operating Expense	One Time Set Up Exp	Total Cost Per Employee
Entry level attorney	\$ 42,900	\$ 8,867	\$12,167	\$ 63,934	\$ 2,500	\$ 4,700	\$ 71,134
After 1 year level attorney	\$ 45,600	\$ 9,426	\$12,167	\$ 67,193	\$ 2,500	\$ 4,700	\$ 74,393
After 2 year level attorney	\$ 48,312	\$ 9,986	\$12,167	\$ 70,465	\$ 2,500	\$ 4,700	\$ 77,665
After 3 year level attorney	\$ 51,012	\$ 10,544	\$12,167	\$ 73,723	\$ 2,500	\$ 4,700	\$ 80,923
Entry level investigator	\$ 29,592	\$ 6,117	\$12,167	\$ 47,876	\$ 2,500	\$ 4,700	\$ 55,076
Entry level secretary	\$ 20,904	\$ 4,321	\$12,167	\$ 37,392	\$ 300	\$ 3,040	\$ 40,732

	TOTAL COST BY ATTORNEY LEVEL: ENTRY THRU AFTER 3 YRS			
	Scenario #1 Entry Level	Scenario #2 after 1 yr level	Scenario #3 after 2 yr level	Scenario #4 after 3 yr level
Attorney cost x 10	\$ 711,345	\$ 743,926	\$ 776,651	\$ 809,232
Investigator cost x 2	\$ 110,151	\$ 110,151	\$ 110,151	\$ 110,151
Secretary cost x 3	\$ 122,196	\$ 122,196	\$ 122,196	\$ 122,196
Total Cost	\$ 943,692	\$ 976,273	\$ 1,008,998	\$ 1,041,579

Formulas & Costs:

Support Staff Formula - Investigator: (# of APD's/5) + 1
(16 + 10)/5 + 1 = 6; have 4 - need 2 addtl Investigator positions.

Support Staff Formula - Legal Secretary # of APD's/3 to a max of 3, balance to be Secretary
(16 + 10)/3 = 8.67; have 6 - need 3 addtl Secretary positions

Operating Expense	Atty & Invest	Sec
Travel	\$ 2,000	\$ -
Supplies	\$ 500	\$ 300
Total	\$ 2,500	\$ 300

One Time Set Up Expense		
Computer & Laptop	\$ 2,600	\$ 1,300
Printer	\$ 500	\$ 500
Furniture	\$ 1,600	\$ 1,240
	\$ 4,700	\$ 3,040